

# **BCI Exhibit 648**

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555 (JMP); 08-01420 (JMP) (SIPA)

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

## Debtors.

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

United States Bankruptcy Court

## One Bowling Green

New York, New York

December 10, 2009

2:03 PM

## B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

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2 SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDING:

3 I. CONTESTED MATTERS:

4 HEARING re Trustee's Motion Pursuant to SIPA § 78fff-2(f),  
5 Bankruptcy Code §§ 105(a) and 363(b), and Fed. R. Bankr. P.  
6 9019(a) for Entry of an Order Approving the Trustee's  
7 Implementation of the LBI Liquidation Order to Complete the  
8 Account Transfers for the Benefit of Customers, Including the  
9 Related Limited Settlement Agreement for the Benefit of Private  
10 Investment Management Customers, and Terminating the Account  
11 Transfer Process

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13 II. ADVERSARY PROCEEDINGS:

14 Bank of America v. Lehman Brothers Special Finance, Inc.  
15 [Adversary Case No. 08-01753]

16 HEARING re Motions for Summary Judgment

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18 Veyance Technologies, Inc. v. Lehman Brothers Special Finance  
19 Inc. [Case No. 09-01535]

20 HEARING re Motion to Deposit Funds into Court Registry

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2 III. RULE 60(b) MATTERS:

3 HEARING re Motion to Compel Production of Documents from the  
4 Trustee and the Committee Based on Privilege Waiver filed by  
5 Hamish Hume on behalf of Barclays Capital, Inc.

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P R O C E E D I N G S

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10 THE COURT: Be seated, please. I just want to be

clear that everybody knows that I have split the calendar and that part of what was to have been heard this afternoon is going to be heard tomorrow morning at 10:00. I would just like debtors' counsel to state publicly for the record what's on for this afternoon so that if there's anybody here who can go home and do other things, they can leave. If everybody's properly here, they're welcome to stay.

11 Did I ask the first really tough question?

12 MR. SLACK: You might have. I may need a minute to get the matters down, Your Honor.

13 THE COURT: I believe it is the LBI motion, Veyance summary judgment and Bank of America and 60(b) for today.

14 MR. SLACK: That sounds right, Your Honor.

15 THE COURT: And if anybody is here on motions to dismiss, any adversary proceedings, you're welcome to stay but I'm going to be hearing those tomorrow morning at 10. Okay. Let's proceed.

16 MR. SLACK: Your Honor, with respect to the four 17 matters that you just mentioned -- by the way, it's Richard 18 Slack from Weil Gotshal for the debtors. Does Your Honor have 19 a suggestion or a preference as to how you'd like to order the 20 matters?

21 THE COURT: Yes. I'd like to start with LBI, then

1 Vance, because we're here this afternoon because of Vance's  
2 original order to show cause. And that's why we have a semi  
3 omnibus day today. I also understand that there is a timing  
4 issue in respect of that matter. Then the Bank of America  
5 summary judgment argument and we'll close with the 60(b)  
6 arguments on privileged waiver.

7 MR. SLACK: All right. Very good, Your Honor. Thank  
8 you.

9 MR. KOBAK: Good afternoon, Your Honor. James Kobak  
10 on behalf of the SIPA trustee. We appreciate your taking our  
11 matter first. I'm here today on a motion to approve completion  
12 of all the transfers of customer accounts in this proceeding  
13 including the final steps of the transfer of assets for the  
14 benefits of customers having PIM accounts which are the  
15 accounts that were transferred to Barclays. I think in some  
16 ways this is a historic occasion. We're really talking about  
17 the largest account transfer in the history of SIPA. And  
18 perhaps one of the largest, if not the largest, account  
19 transfer of any kind ever.

20 I think it all was contemplated from the inception of  
21 these proceedings and even before. And it was described by  
22 ourselves, Mr. Caputo, Mr. Miller and others at the sale  
23 hearing that what was going to be involved in this proceeding  
24 was the transfer of the great bulk of customer accounts but not  
25 all of them. It was always understood there were going to be a

1 few that would probably remain behind but that the great  
2 majority would be transferred.

3 In all, over 110,000 accounts involving something  
4 close to 92.5 billion in property for the benefit of customers  
5 has been or will be transferred if Your Honor approves our  
6 motion today. This took place in three tranches: first, the  
7 so-called PAM accounts which went to Ridge Clearing on behalf  
8 of Neuberger Berman; several hundred prime broker accounts who  
9 participated in the trustee's protocol and were transferred to  
10 other SIPC members; and finally, the PIM accounts which were  
11 transferred to Barclays.

12 Even though it's been difficult and time consuming  
13 and has taken a long time to be able to transfer every last bit  
14 of property, every last dollar, and that's what we're about  
15 here today, customers have had access to these accounts as if  
16 all the property was in the account in virtually every case in  
17 virtually the beginning of this liquidation. And again, that  
18 was a fundamental expectation and purpose of this liquidation  
19 that not only would these customers be fully protected but  
20 there wouldn't have to be a disruption in trading.

21 It also means that we do not have a customer claims  
22 process which I estimate would be at least fifteen times larger  
23 than the one we're dealing with today with attendant cost  
24 delays and thousands and thousands of potential objections to  
25 claims.

1                   We're here today because we want to transfer the last  
2                   bit of property to complete the PIM conversion which is the  
3                   last step in the entire account transfer process. This  
4                   involves some substitutions or payments for securities that  
5                   haven't been available for a variety of reasons. This is  
6                   really the only part of this motion that anyone objects to and  
7                   that's on very general grounds, not because of any particular  
8                   terms of the proposed agreements or any factual issues. The  
9                   debtor and the creditors' committee have looked at this. They  
10                  also looked at the earlier Neuberger and some of the other  
11                  transfers and they don't oppose this motion. And the SEC, New  
12                  York Fed and SIPC all specifically support it.

13                  The reason that we have these problems that we're  
14                  trying to rectify today is that there's property that's held by  
15                  foreign custodians or affiliates who won't release it  
16                  voluntarily or are involved in their own insolvency  
17                  proceedings. There are problems with transfers agents that we  
18                  have to deal with to transfer property. In some cases, there's  
19                  excess margin that may have been involved in repos or became  
20                  collateral that was seized by banks or others, some amounts  
21                  that are owed by brokers that has not been delivered. And some  
22                  of these same issues were involved in the PAM transfer to  
23                  Neuberger which, as I said, the holding company and the  
24                  creditors' committee have also looked at. We're pursuing these  
25                  items but it's clear that we're not going to be able to recover

1 it any time soon and it's time to get this part of the transfer  
2 done.

3 We also wanted to file this motion and come before  
4 you and the rest of the interested parties to make this whole  
5 thing as transparent as possible.

6 I want to say at the outset that this last step,  
7 although it involves Barclays, isn't intended to benefit  
8 Barclays. It's for the benefit of customers. And most of what  
9 we're talking about will go into the customers' accounts, not  
10 to Barclays. It avoids claim disputes and confusion between  
11 us, SIPC, Barclays and thousands of customers. There's no love  
12 loss between the trustee and Barclays at this point. In our  
13 other proceedings, which Your Honor is aware of, we're fighting  
14 tooth and nail to protect customers in the estate by trying not  
15 to allow Barclays to claim a dime that we don't think they're  
16 entitled to under the proper interpretation of the sale  
17 agreement or as part of the transaction that was explained to  
18 and approved by this Court.

19 But these transfers aren't for the benefit of  
20 Barclays; they're for the benefit of customers. To the extent  
21 there's some cash or property going to Barclays, it is only  
22 because for a long period of time, Barclays funded these  
23 accounts even when the property wasn't there. The trustee is a  
24 fiduciary and just as when it's necessary to proceed against  
25 Barclays, he's prepared to do that aggressively. He also

1 thinks in this case that Barclays is clearly entitled to that  
2 property.

3 We've been careful to do the reconciliation and we've  
4 negotiated hard, along with SIPC, to make sure that Barclays  
5 isn't getting anything more than what they could be entitled  
6 to. Indeed, there will even be some property coming back to us  
7 depending on what happens in the markets and in the case of a  
8 few CUSIPS that may have been misdelivered to Barclays early on  
9 in the proceeding.

10 And, as I say, the debtor and the committee in the  
11 Chapter 11 have looked into this as well as the earlier  
12 transfer to Neuberger's. There are a few changes that have  
13 been made to the order as a result of their review. We  
14 circulated those last night. I think we've handed out copies,  
15 a blacklined copy to everyone that's here. And I have copies  
16 with me today. And if Your Honor approves this order, we'll  
17 submit a copy of the final order to your clerks.

18 As I've said, SIPC, the SEC, the New York Fed support  
19 this motion. There are only four parties who object:  
20 basically, Westernbank whose objection has been joined by three  
21 other parties, Hipotecas, if I'm pronouncing that correctly,  
22 the Hudson Bank and Newport. They object only to the part of  
23 the settlement agreement involving this final step in the PIM  
24 transfers to Barclays and they do not -- they object solely on  
25 legal or policy grounds but not because of any specific terms

1 of the agreement or any disputed factual issues.

2 Three of these parties, Westernbank, Hudson and  
3 Hipotecas, have had their claims denied so far in our  
4 proceeding because they're repo claims. It's obviously an  
5 issue that will come before Your Honor somewhere down the line.  
6 Those accounts were not transferred as part of the PIM transfer  
7 because repos were never -- accounts with repos in them were  
8 never in the PIM account range at LBI. I'm not even sure they  
9 were really coded in a customer account range.

10 Hipotecas, as it turns out, had four other accounts  
11 that were PIM accounts so those have been transferred. But,  
12 like other repo customers, when it comes to the repo account,  
13 that's just not something that was included in the transfer.  
14 It's not an account that Barclays agreed to take.

15 And just to complete the record, we've objected to  
16 Newport's claim because we think that was an account that was  
17 really with LBIE and not with LBI.

18 The objectors make four basic points which I'll cover  
19 just very briefly. First, they say there's an inconsistency  
20 between this motion and the motion we're making under 60(b) and  
21 the adversary proceeding against Barclays. I think I've  
22 already addressed that. But in addition to what I said  
23 earlier, the settlement agreement and the order very carefully  
24 and specifically carve out any res judicata or other effect on  
25 the parties' positions in those other litigations. So I don't

1 think that's really a serious issue.

2 They argue this motion is somehow inconsistent with  
3 the allocation motion. But the allocation motion only deals  
4 with customer property for the net equity claims phase of the  
5 liquidation. And basically, what we're talking about is what's  
6 left to be divided among customers on a net equity basis in  
7 that process, which is a separate statutory process and phase  
8 of the liquidation.

9 Third, they argue that in some sense, this transfer  
10 is discriminatory as to those customers who aren't part of the  
11 transfer. And it is discriminatory in the sense that there are  
12 customers in any situation like this who might have their  
13 accounts satisfied more completely. We'll certainly get return  
14 of their property much sooner if they're included in an account  
15 transfer than if they go through a claims process.  
16 Unfortunately, that's just a bi-product of two things. One is  
17 that the statute specifically says that a trustee, with the  
18 consent of SIPC, can transfer some, but not necessarily all,  
19 accounts if that seems to be the efficient and prudent thing to  
20 do that will maximize protection and eliminate expense. And  
21 that was done in this case.

22 And the second thing that causes it is just the fact  
23 that there was no broker willing to take these miscellaneous  
24 other accounts including the repo accounts. Wherever the  
25 trustee could find someone, as in the case of the prime brokers

1 who agree to the protocol, wherever we could find a broker who  
2 would take the accounts, we tried to do that. But  
3 unfortunately, that couldn't be done in these cases. We think  
4 there's ample statutory authority for what the trustee did with  
5 SIPC's consent. And as I've said, the SEC, the New York Fed  
6 and SIPC all support this motion.

7 The final point they make is that somehow doing this  
8 transfer will slow down the claims process. And, with all due  
9 respect, that makes no sense to me. We've proceeded in  
10 parallel. We've already decided -- we've already determined  
11 more than eighty-seven percent of the public customer claims  
12 even while we're doing the transfers. If we didn't do the  
13 transfers as I said before, it would have multiplied the number  
14 of claims by a factor of at least fifteen and would have  
15 increased the expense, the delay, the objections and so forth  
16 in the claims process inordinately. And in fact, that's  
17 clearly one reason why we made the decision -- why the decision  
18 was made early in this case that there should be a transfer of  
19 accounts and certainly one reason why SIPA consented to it.

20 So we feel that all the statutory prerequisites have  
21 complied with. We feel that the transfers in general and this  
22 final piece of it are clearly in the best interest of the  
23 estate. We think they serve the purpose that this proceeding  
24 was all was intended to have. And we'd ask Your Honor to  
25 approve this last stage -- the whole process including the last

1 stage involving the final transfers of property through  
2 Barclays to the customers who are transferred to Barclays.

3 THE COURT: You say final. Is there anything more  
4 that you expect will be required in order to complete the  
5 process of transferring all customer accounts?

6 MR. KOBAK: There are a few little reconciliations  
7 that will be made at the end. But it doesn't really affect the  
8 agreement or what we're asking Your Honor to do. There may be  
9 some calculations that have to be made. The creditors'  
10 committee and the debtor have asked to, not really for consent  
11 in that process but to be advised of it. And we willingly  
12 agreed to do that.

13 THE COURT: In the reply papers that you filed which  
14 I reviewed in connection with the various objections that  
15 you've just referred to, you make it clear that the accounts  
16 being transferred are for the benefit of customers and not for  
17 the benefit of Barclays. However, in your oral presentation,  
18 you also made clear that some value is going to Barclays  
19 presumably to cover various advances made over the last more  
20 than a year by Barclays --

21 MR. KOBAK: That's correct.

22 THE COURT: -- for managing these accounts. So my  
23 question is how much is actually going to Barclays in this  
24 transaction to the benefit of their accounts.

25 MR. KOBAK: I need to consult with someone, Your